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No. 747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL,
Petitioners

v.

ORVILLE S. CARPENTER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT WITH SUPPORTING BRIEF

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v.

ORVILLE S. CARPENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

To The Honorable The Supreme Court of the United States:

The petition of Geo. H. Sheppard, Comptroller of Public Accounts for the State of Texas, and Charley Lockhart, State Treasurer of the State of Texas, for a writ of certiorari to the Supreme Court of Texas, respectfully shows to this Honorable Court:

I

QUESTION PRESENTED

This case relates to the right of the respondent, Orville S. Carpenter, to draw his salary as a civil officer under the State of Texas while engaged in the active military service of the United States.

The determination of this case depends upon the decision of the following questions, to-wit:

(a) Whether the respondent, Orville S. Carpenter, retained his status as an officer in the National Guard of Texas after having entered into the active military service of the United States in compliance with the order of the President of the United States, issued under authority of Public Resolution No. 96 Seventy-sixth Congress, approved August 27, 1940;

(b) Whether the civil office held by respondent under the State law was vacated in virtue of Section 576, Title 10 U. S. C. upon his entering into the active military service of the United States in compliance with the President's orders;

(c) Whether the holding of the Supreme Court of Texas has denied to petitioners any right, privilege or immunity under the Fourteenth Amendment; and

(d) Whether such holding of the Supreme Court of Texas has violated Art. 1, Sec. 8 of the Constitu-

tion of the United States, regulating land forces, organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.

The Supreme Court of Texas held that the respondent retained his status as an officer in the Texas National Guard after entering into the active military service of the United States, and therefore that, under the Texas Constitution, he also retained and was entitled to receive a salary for his civil office as Member, Chairman and Director of the Texas Unemployment Compensation Commission. Under the settled law of Texas, if the respondent lost his status as a member of the National Guard upon entering the active military service of the United States, he was no longer entitled to hold and draw a salary for his civil office. The determination of the status of respondent necessarily involved a construction of the Constitution and pertinent laws of the United States, hereinafter copied and referred to specifically. It is the position of petitioners that the Supreme Court of Texas erroneously construed the Constitution and laws of the United States, and therefore ordered the payment to respondent of State funds which it would not have ordered except for such erroneous construction.

The undisputed facts presenting the question stated are as follows:

On February 15, 1937, respondent was appointed a member and made Chairman and Executive Direc-

tor of the Texas Unemployment Compensation Commission for the term ending November 21, 1940. This appointment was duly confirmed, and the respondent duly qualified, and became and was an active member and Chairman and Executive Director of said Commission, which said position is an office or position of honor, trust or profit under the established laws of Texas, within the meaning of Sections 12, 33 and 40 of Article XVI of the Constitution of the State of Texas.

Respondent is a member of the National Guard of the United States, and was on December 28, 1938, a member of the National Guard of the State of Texas, and on said 28th day of December, 1938, was duly commissioned by the Governor of the State of Texas with the rank of Major in the National Guard and assigned to the State Staff Corps.

On January 8, 1939, respondent was given Federal recognition by being commissioned with the rank of Major in the National Guard of the United States.

Pursuant to the terms of Public Resolution No. 96, enacted by the Seventy-sixth Congress, and approved August 7, 1940, respondent was by the President duly ordered into the active military service of the United States, effective September 19, 1940, for a period of twelve months, unless sooner relieved, and was assigned to the Eighth Corps Area Service Command and detailed to duty with the Military Department of the State of Texas at Austin, Texas, for duty in connection with Selective Service Planning

of the State of Texas. In obedience to said order respondent duly reported for the performance of the duties assigned him therein, and has held and exercised the office of Major in the active military service of the United States since September 19, 1940, and has not been relieved therefrom. Respondent has never voluntarily resigned his said civil office under the State of Texas.

II.

STATUTORY PROVISION SUSTAINING THE JURISDICTION OF THIS COURT

This court has jurisdiction to review by certiorari the judgment of the Supreme Court of Texas hereinafter mentioned and described, under Section 344 of Title 28 of the United States Code Annotated, which provides that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where

the Federal claim is sustained as where it is denied."

III.

STATUTES AND CONSTITUTION INVOLVED

The statutes of the United States, under which petitioners specially set up and claim rights, privileges and immunities as public officers clothed by the established laws of the State of Texas with the powers and duties to deal with and disburse under appropriate legislative action the public funds of the State of Texas, are as follows, to-wit:

1. Public Resolution No. 96, Seventy-sixth Congress, effective August 27, 1940:

> "Section 1. That during the period ending June 30, 1942, the President be, and is hereby, authorized from time to time to order into the active military service of the United States for a period of twelve consecutive months each, any or all members or units of any or all reserve components of the Army of the United States (except that any person in the National Guard of the United States under the age of eighteen years so ordered into the active military service shall be immediately issued an honorable discharge from the National Guard of the United States), and retired personnel of the regular army, with or without their consent, to such extent and in such manner as he may deem necessary for the strengthening of the National defense: provided, that the members and units of the

reserve components of the Army of the United States ordered into active Federal service under this authority shall not be employed beyond the limits of the western hemisphere except in the territories and possessions of the United States, including the Phillipine Islands.

"Section 2. All National Guard, Reserve, and retired personnel ordered into the active military service of the United States under the foregoing special authorities shall from the dates on which they are respectively required by such order to report for duty in such service, be subject to the respective laws and regulations relating to enlistments, reenlistments, employment, conduct, rights, and privileges, and discharge of such personnel in such service to the same extent in all particulars as if they had been ordered into such service under existing general statutory authorization."

Section 2, Title 10, of the United States Code Annotated:

"The army of the United States shall consist of the regular army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers Reserve Corps, the Organized Reserves, and the enlisted reserve corps."

Section 355 of the same Title:

"All persons appointed officers in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States."

Section 81, of Title 32, "National Guard" U. S. Code Annotated:

"When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination as he n. , prescribe, order into the active military service of the United States, to serve therein for the period of the war or emergency, unless sooner relieved, any or all units and members of the National Guard of the United States. All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective states, territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact in so far as practicable.

"Commissioned Officers and warrant officers appointed in the National Guard of the United States and commissioned or holding warrants in the Army of the United States, ordered into Federal service as herein provided, shall be ordered to active duty under such appointments

and commissions or warrants: provided, that those officers and warrant officers of the National Guard who do not hold appointments in the National Guard of the United States and commissions or warrants in the Army of the United States may be appointed and commissioned or tendered warrants therein by the President, in the same grade and branch they hold in the National Guard.

"Officers and enlisted men while in the service of the United States under the terms of this section shall receive the pay and allowances provided by law for officers and enlisted men of the Reserve forces when ordered to active duty, except brigadier generals and major generals, who shall receive the same pay and allowances as provided by law for brigadier generals and major generals of the regular army, respectively. Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.

"In the initial mobilization of the National Guard of the United States, war strength officer personnel shall be taken from the National Guard as far as practicable, and for the purpose of this expansion warrant officers and enlisted men of the National Guard may, in time of peace, be, appointed officers in the National Guard of the United States and commissioned in the Army of the United States."

2. Section 576, Title 10, of the United States Code Annotated, which is as follows, to-wit:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army and his commission shall be thereby vacated."

3. Section 8, of Article I of the Constitution, Subsection 16, which is as follows, to-wit:

"The Congress shall have power * * * to provide for organizing, arming, and disciplining the militia, and for the governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;"

4. Section 1 of Article XIV (Amendments) of the Constitution for this, the construction placed by the Supreme Court of Texas upon the State constitutional amendments of 1932, upon which construction it has rendered final judgment in favor of respondent awarding a writ of mandamus against petitioners to compel the payment of official salary to respondent for a period of time after the 19th day of September, 1940, the effect of which construction abridges the privileges and immunities of citizens of the United States, and denies to persons within its jurisdiction, to-wit, in the State of Texas, the equal protection of the laws.

IV.

DATE OF JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR CERTIORARI

The judgment of the Supreme Court of Texas was rendered, and its opinion was delivered on October 24, 1940. (R. 34). Petitioners' motion for a rehearing was filed in the said Supreme Court within fifteen days thereafter, as authorized by Article 1762 of the Revised Civil Statutes of Texas, (R. 35) which motion was duly and regularly entertained by the court and was thereafter overruled on the 22d day of November, 1940, (R. 95) upon which overruling the Supreme Court wrote and delivered its opinion (R. 91) whereupon the said judgment of the honorable Supreme Court of Texas then and there became final, under the established laws of Texas.

The honorable Supreme Court of Texas is the highest court of the State in which a decision in this suit could in any event be had. The record of the cause is in the possession of the Supreme Court of Texas. A duly certified transcript of such record is filed along with this Petitioner.

V.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This suit was instituted by respondent, Orville S.

Carpenter, as an original proceeding in the Supreme Court of Texas, seeking a mandamus against the petitioners as Comptroller of Public Accounts and State Treasurer of the State of Texas, respectively, in their official capacities, to compel the issuance and payment of a warrant for official salary claimed by the Relator therein, respondent herein, for his services as a State officer, member of the Texas Unemployment Compensation Commission for the remainder of the month of September, 1940, after the 19th day (inclusive) of September, 1940. The suit was properly instituted and was maintainable under Article 1735 of the Revised Civil Statutes of Texas. (R. 1).

The respondents—petitioners herein—duly filed their answer in said suit (R. 11), tendering only issues of law, since under the Constitution and established laws of Texas the Supreme Court of Texas has no jurisdiction to determine disputed issues of fact.

Included among the issues of law tendered by defendants in said suit were the issues as to Federal questions of law hereinafter more specifically shown in the next succeeding subdivision of this petition.

To the Relator's petition for a mandamus to compel the payment of his salary, the respondents answered, pleading specifically that under the provisions of Section 12 of Article XVI, and of Section 33 of Article XVI of the Constitution of the State of Texas, relator (respondent herein) vacated his of-

fice as a member of the Texas Unemployment Compensation Commission on September 19, 1940, when on such date he entered the active military service of the United States, and in such service held and exercised the office of Major, same being an office of profit and trust under the United States, thereby changing his status from that of a National Guard officer to that of an officer of the United States Army, and clearly forbidden to hold said office under both State and Federal laws, for which reasons they had no authority, and were forbidden by law, to pay to him the said salary so demanded of them. R. 16-17).

The Supreme Court upon the pleadings rendered its judgment and delivered its opinion, holding, to quote the court's language:

> "The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article 16 of the Constitution, above copied herein. Those amendments reflect the will of the people of this State with reference to the members of the National Guard. The clear policy of this State with respect to that matter is plainly expressed therein." (R. 31)

Sections 33 and 40 of Article XVI referred to by the court are as follows, to-wit:

> "Sec. 33. The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for sal-

ary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution. *Provided, that this restriction as to the drawing and paying of warrants upon the treasury shall not apply to officers of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, nor to enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States.*

"Sec. 40. No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of peace, county commissioner, notary public and postmaster, *officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States, and enlisted men of the National Guard, the National Guard Reserve, and the organized Reserves of the United States, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer, or enlisted man of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States from holding in conjunction with such office any other office or position of honor, trust or profit, under this State or the United States.*"

For the convenience of this court, we have italicized in the above quotations in each Section the mat-

ter added by the amendments referred to by the court.

VI.

THE PLEADINGS, RULINGS AND METHODS WHICH BRING THE CAUSE WITHIN THE JURISDICTION OF THIS COURT

In the answer of respondents filed in the Supreme Court they pleaded as follows:

"That on January 30, 1939, said Carpenter was by the President of the United States duly appointed and commissioned a Major, Adjutant General's department, in the National Guard for the United States in the army of the United States, for which office he duly qualified.

"That under the authority of Public Resolution No. 96, Seventy-sixth Congress, approved August 27, 1940, said Carpenter was ordered by the President of the United States for a period of twelve months beginning September 19, 1940, unless sooner relieved, and assigned to the Eighth Corps Area Service Command of the army of the United States and detailed to duty with the Military department of the State of Texas, at Austin, Texas, for duty in connection with selective service planning of that State. That in obedience to said order of the President, Carpenter reported for said duty under said order on September 19, 1940, and has from and after that date held and exercised the office of Major in the

active military service of the United States and discharged the duties assigned to him as such officer; that he has not been relieved from such duty nor discharged from such active military service; that for such service under the United States he is entitled, under the laws of the United States, and will demand and receive the compensation attaching to his rank as Major in such service, in the sum of $405.00 per month, from and after September 19, 1940." (R. 14)

In their motion for a rehearing in the Supreme Court of Texas the respondents (petitioners herein) pleaded specially:

"Each of the following statutes and authorities asserts and recognizes that a National Guardsman drafted into the active military service of the United States under Section 111 of the National Defense Act does not, while in that service, occupy the status of a member of the National Guard." (R. 42)

Section 81, Title 32, U. S. C. A.: 'All persons so ordered into the active military service of the United States shall from the date of such orders stand relieved from duty in the National Guard—so long as they shall remain in the active military service of the United States. Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status. * * * " (R. 42)

In said motion for rehearing the respondents further alleged:

"Congress has seen fit to provide by law as follows: 'No officer of the army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the army and his commission shall be thereby vacated.' "—Title 10, Section 576, U. S. C. A.' " (R. 50)

"The holding of this court is in direct conflict with the provisions of the Federal laws regulating officers in the active service of the United States army since this court holds that an officer who goes into the active service of the United States retains his status as a National Guardsman of Texas and thereby may hold his civil office and an office in the United States army at the same time, whereas, the Federal law, which is supreme, expressly provides that this status is changed and he is subject only to the rules and regulations of Congress." (R. 50).

They further pleaded in said motion for rehearing:

"The question here presented is whether the decision of this court is the law fixing the status of relator as an officer of the National Guard of Texas when he goes into the active duties in the United States army and thereby let him hold a civil office in Texas while serving as an officer in the United States army or whether Congress has the power to fix his status and deny the relator the right to hold any civil office of honor trust under this State. If Congress has the power to fix the status of relator while he is in the

active service of the United States army, then it has expressly denied him the right to hold said office in unmistakable terms." (R. 51-52)

Respondents likewise set forth in their motion for rehearing in the State Supreme Court as follows:

"In Article I, Section 8, of the Constitution of the United States, it is provided among other provisions as follows:

> 'The Congress shall have power to make rules and regulations for the government of land and naval forces;—to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.'" (R. 49)

"Article VI, paragraph 2, of the United States Constitution, provides:

> 'This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme laws of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'"

"The provisions of the Constitution of the United States above quoted make it clear that the State of Texas cannot by statute or constitutional provision pass any law which attempts to fix the status of an officer in the National Guard of Texas beyond the day when such officer becomes an active officer of the United States Army by call of the President in times of emergency as provided by Congress." (R. 49)

In the same motion the respondents further pleaded:

"This court has stated on page 4 of its opinion, 'that this State retains a right concurrent with that of the United States Government, to organize and train its Militia.' This holding obviously is made as a predicate for the ultimate decision upon the conception (and express holding) that the status of members of the National Guard of Texas abides with those members even after they have regularly entered the active military service of the United States Government under the order of the President. In this sense we submit the authority or right of the State is not concurrent with that of the United States with respect to its (the State's) Militia after that portion of the Militia, to-wit, the National Guard, has been ordered into the active military service of the United States." (R. 47-48)

Finally, in said motion for rehearing respondent pleaded that the State court's construction of the

amendment to Article XVI, Section 40, of the State Constitution, renders the amendment violative of the Fourteenth Amendment to the Federal Constitution. (R. 52). The plea expressly made the point:

"Thus, the court decides that even as between members of the National Guard, the people of Texas intended to make an unjust discrimination and to deny to a large portion of the National Guard membership the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution." (R. 58-59)

The pleading of such respective Federal questions in these respondents' motion for a rehearing in the State Supreme Court was justified and, we submit, within the well-established rules and decisions of this court, because the Supreme Court of Texas had never theretofore made any holding of the kind in said motion complained of, and the respondents therein had no reason to expect, nor did they expect, that the Supreme Court of Texas would make such holdings thus infringing upon the laws of the United States.

Moreover, these petitioners would show that the relator in the State court himself drew into the cause a Federal question in this, that he alleged his exact status in the United States Army and sought in his petition to recover compensation for a service in connection with a civil office in the State of Texas which, under the Federal law he was and is expressly forbidden to hold, viz.:

"That relator is a member of the National Guard of the United States and of the State of Texas, and on the 28th day of December, 1938, he was duly commissioned by the Governor of Texas with the rank of major in said National Guard and assigned to the State Staff Corps. That he has been given Federal recognition with the rank of major in the National Guard of the United States and of the State of Texas, and n the 3t0h day of January, 1939, he was commissioned with the rank of major in the National Guard of the United States in the army of the United States, and relator now holds said rank in said service.

"That pursuant to proclamation of the President, under authority of Public Resolution No. 96 enacted by the 76th Congress, approved August 27, 1940, relator was by command of Major General Broees, Commander of the Eighth Corps Area of the United States, ordered to active duty, effective September 19, 1940, for a period of twelve months, unless sooner relieved, and assigned to the Corps Area Service Command and detailed to duty with the Military Department of the State of Texas, at Austin, Texas, for duty in connection with selective service planning of the State of Texas under Senate Bill No. 4164, 76th Congress, 3rd Sessino, known as the Selective Training and Service Act of 1940, being an act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training. That in obedience to said order, relator reported for the duties assigned to him thereunder and has been discharg-

ing such duties since September 19, 1940, and has not been relieved therefrom." (R. 2-3)

The Supreme Court of Texas, however, notwithstanding said pleas and matters herein shown, overruled respondents' said motion for a rehearing and thereby made final its prior decision awarding to relator the writ of mandamus, and in so doing disclosed that said contention of a Federal question was recognized as being before it, and necessarily overruled and disregarded each and all of said pleas and suggestions, (R. 91) thereby bringing this cause clearly within Subdivision (b) of Section 344, of Title 28, of the United States Code Annotated.

These petitioners would show that in their capacities as State officers handling and controlling the fiscal affairs and disbursing the public funds of the State of Texas, in which capacities, respectively, they have been sued herein, they are hurt, prejudicially affected, and have been denied rights, immunities, and privileges vouchsafed by the statutes and Constitution of the United States, as herein shown.

VII.

STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

While the amount of money involved in this im-

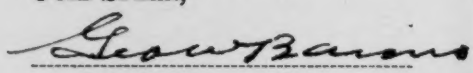
mediate suit is small, the questions of governmental authority involved, especially at this moment of stress throughout the country, are of real and very substantial importance. It is submitted that this case, as rendered by the Supreme Court of Texas, ignores if it does not challenge the supreme power of the Constitution and the Congress of the United States in the matter of the exclusive authority and control over the Federal officers in the active Army of the United States as against the subordinate and inferior right of the State to appoint and to utilize such Federal officers for purposes of State local concern.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and send to this court on a day to be therein named, for its review and determination a full and complete transcript of the records and proceedings had in said court and entitled on the docket No. 7796, Orville S. Carpenter, Relator, vs. George H. Sheppard, Comptroller of Public Accounts, et al, Respondents, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment of the said Supreme Court of Texas be reversed by this court, and for

such other and further relief as to this Honorable Court may seem right and proper.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas
GROVER SELLERS,
First Assistant Attorney General
R. W. FAIRCHILD,
OCIE SPEER,



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